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IN THE SUPREME COURT OF THE

UNITED STATES

CITY OF SANTA ANA,

Petitioners,

vs.

DALE CONNER AND LINDA CONNER,

Respondents.

BRIEF OF CALIFORNIA CITIES AMICUS CURIAE ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The California cities of Alameda, Arcadia, Burlingame, Coachella, Culver City, El Cajon, Gardena, Glendale, Indio, Merced, Monterey, Palm Desert, Placentia, Pleasant

Hill, Rolling Hills Estates, San Francisco, San Jose, Santa Maria, South Lake Tahoe, South San Francisco, Turlock, Tustin, and Vacaville ("Cities"), as authorized by their respective law officers set forth on the Appendix hereto, support as amicus curiae the petitioners City of Santa Ana, et al. for issuance of a writ of certiorari to review the judgment of the United States Court of Appeal for the Ninth Circuit entered in the above-entitled case, reported at 897 F.2d 1487 and attached as Appendix A to the Petition.

I.

INTEREST OF THE CITIES

Cities are located throughout California and differ from each other in numerous respects. They all, however, share the same problem as petitioner City of Santa Ana: the necessity to abate nuisances which impinge upon the health, safety and welfare of their residents. These concerns are not limited to inoperable vehicles, but also deal

with a variety of conditions involving excessive noise, offensive odors, fire hazards, unsafe buildings and traffic obstruction which may all be abated under procedures similar to that rejected by the Ninth Circuit in this case. The ability of Cities to protect the public health, safety and welfare will be severely impaired if the judgment below stands.

II.

SUMMARY OF ARGUMENT

The decision below exalts form over substance by a mechanical application of rules without adequate analysis of the competing interests to be served.

Under the opinion, it is Constitutionally acceptable for a non-judicial forum to determine that a citizen may be deprived of property but implementation of that decision requires the pro forma intervention of a court. This bizarre result ignores the rationale for Constitutional protection against search and seizure.

Cities submit that adequate procedural due process relating to abatement of a nuisance in advance of entry on private property is the functional equivalent of a warrant.

III.

ARGUMENT

A warrantless entry was made onto the property of respondents on July 1, 1983 for the purpose of inspection to ascertain whether vehicles in their open yard were inoperable and subject to abatement. There is no dispute that this initial entry required a warrant.

Similarly, there is no dispute that the respondents were thereafter accorded Constitutionally adequate due process in connection with determination of whether they were maintaining a nuisance on their property and whether it should be abated (Petition, Appendix A, pp. 12a-13a). The issue before this Court is whether that due process was adequate to serve as the functional

equivalent of a warrant to allow entry onto the property after the substantive determination had been made that a nuisance existed and was subject to abatement.

California has determined that the presence of inoperable (i.e., "junk") vehicles open to public view on private property is offensive and deleterious to the public interest. The state has expressed this determination in the adoption of California Vehicle Code Sections 22660-22664 which delegate authority to the municipalities of the state to adopt ordinances for alleviating the problem, pursuant to explicit and carefully-defined statutory guidelines.

Santa Ana implemented this authorization by adoption of its Municipal Code Sections 16-113 through 16-121. (Petition, Appendix B, pp. 6b-7b). The ordinance provides for notice and opportunity to be heard by the owner of land from which a vehicle is to be removed. Just as there is no dispute that this ordinance afforded

Constitutionally adequate due process to respondents, there is similarly no dispute that it was a proper delegation of authority by the state to the city. (Petition, Appendix A, pp. 13a-14a).

Respondents went through hearings at two separate administrative levels over a period of months. After the administrative proceedings ended and the Santa Ana City Council had determined the issue against them, respondents failed to avail themselves of their right to seek relief in the state courts. (Petition, Appendix B, pp. 4b-5b).

Shortly thereafter, the city implemented its determination that a nuisance existed on respondents' property by entering upon the property and removing the vehicles, (i.e., abating the nuisance). Although there was no warrant for this action from a court, respondents had been aware for the previous six months that the vehicles were the object of possible removal from their same location

outdoors at which they had initially been discovered.

The Ninth Circuit held that no judicial involvement was necessary in the determination that the vehicles were a nuisance subject to abatement (Petition, Appendix A, p. 13a). However, the Ninth Circuit also held that even after this substantive determination had been made in a non-judicial forum the Fourth Amendment required imposition of another step: review by a judicial officer before entry could be made on to property for the abatement to occur. (Petition, Appendix A, p. 11a).

The Ninth Circuit primarily relied on four cases to reach this result: Camara v. Municipal Court, 387 U.S. 523 (1967); Michigan v. Tyler, 436 U.S. 499 (1978); G.M. Leasing v. United States, 429 U.S. 338 (1977); and Gleaves v. Waters, 175 Cal.App.3d 413, 20 Cal.Rptr. 623 (1985). As will be demonstrated below, the Ninth Circuit's analysis of these cases was flawed because it

telescoped the conceptually-distinct events of inspection and abatement. This Court should now decide whether an abatement following hearings affording procedural due process must be treated the same as an initial inspection to ascertain the existence of a nuisance. There is no case precisely on point and it is one of first impression before this Court.

The requirement that a warrant must be obtained for a civil health and safety inspection was first enunciated by this court in Camara which involved a warrantless inspection made as part of an ongoing city policy to determine compliance with the local building code. The purpose was "annual inspection for possible violations" of San Francisco's building code (Camara, p. 526), and discovery of such violations could lead to criminal prosecution. This Court held that:

> ". . . administrative searches of the kind at issue here are

> significant intrusions upon the interests protected by the Fourth Amendment . . ."

(Camara at p. 534, emphasis added.)

After imposing a Fourth Amendment warrant requirement on initial inspections, this Court thereafter balanced the need for Constitutional safeguards against the community need to correct unsightly conditions that could "adversely affect the economic values of neighboring structures" (Camara, p. 535). In achieving this balance, this Court rejected the requirement of "probable cause" to inspect a particular structure in the context of criminal investigations for a broad area-wide inspection pursuant to reasonable statutory standards. This Court did not make a mechanical application of the reasonableness standards of the Fourth Amendment by placing the competing needs of an individual's privacy expectations against the needs of that individual's neighbors and the public in general for a safe and

healthful community. Rather, this Court broadened the Fourth Amendment requirement of reasonableness to meet the particular public needs involved based on the following rationale:

> "The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant [citations]. Such an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely <u>gives full recognition to the competing public and private interests here at stake</u>

> and, in so doing, best fulfills the historic purpose behind the Constitutional purpose to be free from unreasonable government invasions of privacy."

(Camara at p. 539, emphasis added).

In Michigan v. Tyler, 436 U.S. 499 (1978), certain objects were discovered at the site of a fire by firefighters shortly after the fire was extinguished. Some time later, subsequent entry was made to the site for the gathering of additional objects, all of which were subsequently used in an arson prosecution of the property owner. This Court required a warrant for the subsequent entry and reaffirmed its holding in Camara extending Fourth Amendment protection beyond criminal law enforcement "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials" to inspectors whose:

> ". . . purpose may be to locate and abate a suspected public nuisance

or simply to perform a routine, periodic inspection."

(Michigan at p. 504, emphasis added).

Just as in Camara, the restriction was on the initial intrusion intended for discovery, even though the language of the opinion combines the two separate actions of location and abatement. The Ninth Circuit erroneously telescoped these two concepts into one without examination of the differing interests affected. (Petition, Appendix A, p. 8a). The Ninth Circuit also erroneously relied on a California decision, Gleaves v. Waters, 175 Cal.App.3d 413, 220 Cal.Rptr. 621 (1985) in which the two acts of inspection and abatement had in fact been combined.

In Gleaves, a county had been declared infested with insects dangerous to crops. Pesticide was applied by state inspectors to trees in open enclosed yards without a warrant. Although California law specifically provided for inspection warrants under California Code of Civil Procedure

Sections 1822.50-1822.59, there was no statutory requirement for an abatement warrant. The inspection to determine the presence of the insect and immediate application of the pesticide for abatement upon such discovery were carried out simultaneously. Under such circumstances, a warrant was required.

This Court has not decided any case nor has any other case been discovered, in which the abatement occurred after a full-scale hearing affording Constitutionally-adequate due process. The Ninth Circuit appeared to rely on G.M. Leasing v. United States, supra, for this purpose but it is readily distinguishable. In G.M. Leasing, a tax deficiency had been assessed against a taxpayer but no hearings had been held. IRS agents seized automobiles parked in public places without warrants and also entered a cottage from which material was removed. This Court permitted the warrantless seizure of the vehicles but required a warrant for

the contents of the cottage, once more relying upon Camara. As in Camara, one of the issues was concern with uncontrolled discretion of the officers seizing property which could only be appropriately guided by application of Fourth Amendment protections (G.M. Leasing at p. 357).

Application of the Fourth Amendment to administrative searches is founded on reasonable privacy expectations of individual citizens to limit the uncontrolled discretion of public officers. The only way to accommodate that need was to impose a Fourth Amendment requirement of a warrant on the initial inspection as occurred in Camara. The same requirement existed when the inspection and abatement process were combined into one as existed in Gleaves. Here, however, the abatement followed the initial inspection by some two years, in which intervening time, respondents had notice of the city's intention to remove the vehicles. Thus, the notice requirement of

procedural due process was satisfied. This was the only due process, in the form of a tax assessment notice, that existed in G.M. Leasing.

Thereafter, hearings were held at two administrative levels, first before a city official not actually inspecting the premises and the second before the entire City Council. The Ninth Circuit necessarily found all the elements of procedural due process in addition to notice were fully satisfied. The subject vehicles were in the same place at the end of this process. It was hardly a surprise or an intrusion upon a reasonable expectation of privacy when the city officials actually entered the respondent's yard to carry out the decision that had been communicated to them some months before. The discretion of the city officials was carefully focused and well-controlled. They were only to remove the specific vehicles that had been the subject matter of the hearing and no others. Thus,

the entire rationale for imposition of Fourth Amendment protections in this context had been fully satisfied because the City Council, in conducting its hearing, had served the functional equivalent of a warrant.

The Ninth Circuit, however, apparently believes that a search can be "reasonable" only if it is pursuant to a warrant issued by a "judicial officer" with certain emergency-type exceptions inapplicable here. (Petition, Appendix A, pp. 9a-9b). This Court has held that no such requirement exists. In Shadwick v. City of Tampa, 407 U.S. 345 (1972), the Clerk of the Municipal Court in Tampa, Florida could issue warrants for the arrest of individuals violating local ordinances. This Court rejected the notion that warrants had to be issued by a judge or a lawyer. Rather, this Court stated:

> "The warrant traditionally has represented an independent

assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search . . . .. Whatever else neutrality and detachment entail, it is clear that they require severance and disengagement from activities of law enforcement. There has been no showing whatever here of partiality, or affiliation of these clerks with prosecutors or police. The record shows no connection with any law enforcement activity or authority which would

distort the independent judgment the Fourth Amendment requires."

(Shadwick at p. 350)

Although the fact that the clerk was associated with the judiciary was of significance to this Court, the opinion concluded:

"What we do reject today is any per se invalidation of a state or local warrant system on the ground that the issuing magistrate is not a lawyer or judge. Communities may have sound reasons for delegating the responsibility of issuing warrants to competent personnel other than judges or lawyers. . . . All this is not to imply that a judge or lawyer would normally provide the most desirable review of warrant requests. But our federal system warns of converting desirable practices into Constitutional commandment. It recognizes in

> plural and diverse state activities one key to national innovation and vitality."

(Shadwick at pp. 352-353, emphasis added).

Shadwick recognized the need for local discretion in dealing with the issue of warrant requirements as did Camara in accommodating the different issues involved in civil inspection as compared to criminal investigation. That same flexibility should be applied here to substitute the hearing before the City Council as the functional equivalent to the hearing on a warrant, since virtually all the criteria of Shadwick are satisfied. The City Council members do not lead the investigation nor are they the officers actually inspecting the premises or abating the nuisance thereon. The decision reached is narrowly focused on specific items and the discretion of the officers removing these items is thus controlled. The Santa Ana City Council here was as "neutral and detached" from enforcement as was the Clerk

of the Tampa Municipal Court. The privacy expectations of respondents were non-existent after two years of administrative litigation concerning the particular vehicles. The same policy reasons for a broader and more flexible interpretation of "reasonableness" in light of the public interest exist as were enunciated in Camara.

In short, the requirements of the Fourth Amendment, as authoritatively determined by this Court, are fully satisfied by the procedures used in the narrow circumstances of abatement after administrative hearings as occurred in this case. To allow the judgment below to stand would do far more than exalt form over substance of Constitutional requirements without consideration of their intention. The judgment would also impose a substantial burden on Cities in carrying out their vital local functions. Nuisance abatement proceedings similar to those that occur here are applicable not only to inoperable vehicles but also

to unsafe building conditions, unhealthy food preparation, fire hazards, weeds, trash, blockage of public rights of way and numerous other conditions that impact significantly on the health, safety and welfare of millions of Californians.

As pointed out in Gleaves v. Waters, (p. 420), California has no statutory procedure for obtaining a warrant for abatement. Such warrants are limited to the initial inspection. The only other warrant system is in connection with a criminal investigation (California Penal Code Sections 1523-1542).

Imposing a warrant requirement for abatement after hearings would place a significant burden on Cities as well as an already-overburdened state judiciary for no substantial purpose or rational end.

IV.

CONCLUSION

For the reasons set forth above, Cities pray that this Court issue its writ of

certiorari so that the issues described herein and in the City of Santa Ana's petition may be fully reviewed and determined for the guidance of all concerned.

Dated: June 27, 1990

Respectfully submitted,

ADAMS, DUQUE & HAZELTINE
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APPENDIX

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13. Placentia -- Carol B. Tanenbaum, City Attorney
14. Pleasant Hill -- David Larsen, City Attorney
15. Rolling Hills Estates -- Richard R. Terzian, City Attorney
16. San Francisco -- Louise H. Renne, City Attorney and Burk E. Delventhal, Deputy City Attorney
17. San Jose -- Joan R. Gallo, City Attorney
18. Santa Maria -- Arther R. Montandon, City Attorney
19. South San Francisco -- Valerie J. Armento, City Attorney
20. South Lake Tahoe -- J. Dennis Crabb, City Attorney
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